

IN THE HIGH COURT OF DELHI

FAO No.153/2004

Shri Mugeem Ahmad
Appellant
! through: Mr.Sandeep Sharma, Adv.

VERSUS

\$ State of Uttar Pradesh Respondent
^ through: Mr.Anil Mittal, Adv.

% DATE OF DECISION: 23.11.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y
2. To be referred to the Reporter or not? Y
3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.** (Oral)

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1. Heard learned counsel for the parties. Record of the learned Additional District Judge perused. Record of the Arbitrator which forms part of record of the learned ADJ has also been perused. A short question arises for consideration.
2. In response to a notice inviting tender issued by the respondent, as per tender documents prescribed, appellant submitted the offer.
3. The tender specified the quantities to be executed but vide clause 16 stipulated as under:-

“Clause 16. The Engineer-in-charge shall have power to make such alteration or in additions to the original specification, drawing designs and instructions as may appear to him to be necessary or additional work which the contractor may be so directed to do shall be bound to carry out the work in accordance with any instructions which may be given to him in writing signed by the Engineer-in-charge, and such alterations shall not invalidate the contract, and any additional work which the contractor may be so directed to do shall be carried out by the contractor on the same conditions all respects on which he agreed to do the main work and at the same rates as are specified in the tender for the main work. The time for the completion of the work shall be extended in the proportion that the additional work bears to the original contract work, and the certificate of the Engineer-in-charge shall be conclusive as to such proportions. If the additional work includes any item for which no rate is specified hereunder, then the contractor shall carry out the work at the rate entered in the Schedule of Rates of the District but if the Schedule does not contain any rate for such work, then the contractor shall not begin such work until a rate in respect of such work has been settled by mutual agreement between him and the Engineer-in-charge with the approval of the officer accepting the contract, and if they are unable to agree upon a rate within two weeks from the date when the contractor received the order, the Engineer-incharge may by a notice in writing cancel the order for such work, and carry it out in such manner as he may think best. In the event of a dispute the decision of the Superintending Engineer shall be final and binding on the contractor.”

4. A perusal of Clause-16 shows that if the additional work related to a work for which a rate was specified, additional work would be paid for at the same rate. In relation to additional work for which no rate was provided 3 alterations were stipulated as per which payment had to be made.

5. After offer as per tender documents was submitted by the

appellant, the Department sought variation of, amongst others Clause-16. Unfortunately for the respondent the same was done under cover of its letter dated 7.1.1986 accepting the tender. In said letter it was intimated to the respondent that he was to offer security in sum of Rs.20,500/-. That extra work would have to with the prior permission of the Engineer Incharge and that extra work would be paid as per departmental rate or agreed rate whichever is less.

6. The appellant responded to the said letter vide his reply dated 8.1.1996. He agreed only to one variation, in that, agreed to give/offer security deposit in sum of Rs.20,500/- but requested that a fixed deposit in sum of Rs.20,000/- pertaining to contract No.H6-85 dated 27.12.1985 be treated as deposit pertaining to instant contract and further deposit in sum of Rs.500/- be received from him.

7. At the rear of said letter the department noted the acceptance thereof.

8. Letter dated 7.1.1986 written by the respondent as also appellant's letter dated 8.11.996 as also departmental noting were bound in a formal contract bond.

9. Pertaining to a work for which rate was submitted under the contract i.e. as per offer made by the appellant a dispute arose. Whereas appellant relied upon Clause-16 of the tender

documents, the respondent relied upon its letter of acceptance dated 7.1.1986 to urge that since departmental rates were less than the agreed rates, pertaining to extra work over and above the scheduled quantity, for the work in question, notwithstanding rate being agreed, appellant would be entitled to be recompensed at the departmental rates for the excess work.

10. There being an arbitration clause, dispute was referred to an Arbitrator.

11. The contractor urged before the Arbitrator that the respondent could not vary the tender at the time of the acceptance. Secondly, at best, letter dated 7.1.1986 was a counter offer. Appellant accepted only one term in its letter dated 8.1.1986. Writing at the rear of the letter written by the appellant by the department accepted the conditional acceptance by the appellant meaning thereby contract stood concluded minus 2 out of 3 counter offers as per letter dated 7.1.1986. Lastly appellant urged that right throughout when running bills were cleared for payment and payment made, department paid money as per agreed rates. Only at the final stage when final bill was being settled did the department raised said issue.

12. Vide his award, learned Arbitrator has expressed the view and has concluded as under :-

“From the award letter No. 81/Head Works/T-3 dated 7.1.86 of the Executive Engineer, it is evident that the

date of tender was 27.12.85. Except condition No. 16 of Form III no other condition was notified/prescribed till the date of tender. So the condition in the letter dated 7.1.86 to the effect that if the quantities exceed the agreement quantities the payment will be made at the department or agreement rate whichever is less, was added after the issue of tender and submission of the same on 27.12.85. Every agreement is made in accordance with the terms and conditions of form III. In case any special condition is required to be put/provided then the same was to be provided/put before the issue of tender and the date of the submission of the same. Any condition put after the aforesaid is invalid. Further this special condition put later on has also no approval of the higher authority/officer.

The contractor in response to the aforesaid letter of the Executive Engineer accepted only the condition regarding security deposit and the stamp duty and no other condition. To this effect there is office note also at page 10 of the agreement. Even in this note also there is no mention of this condition.

In case the contractor executes the work with his own sweat will then it is upto the Executive Engineer to make the payment of the same or not. But this work has been executed by the contractor according to the requirement of the department and paid in this running bills. The payment is also entered in the measurement book payable @ Rs. 780/- per cum. Thus the claim of the contractor is allowed. He is entitled for the balance payment and is awarded accordingly.”

13. In the objections filed under Section 30/33 of the Arbitration Act 1940, learned Additional District Judge before whom objections were filed has taken a contrary view.

14. Learned Trial Judge has held as under :-

7. As regards claim no.1, it is an admitted case that quantity of work executed by the petitioner was 525.25 cubic meter and the agreed rate for this item was Rs.7.80 per CM. It is also not in dispute that

initially quantity of this item as mentioned in the agreement was only 100 CM. It is also an admitted case that tender submitted by the petitioners was accepted vide letter dated 7.1.86. Condition no. 3 of this letter specifically provided that in case of excessive work, contractor will be paid at departmental rate or contract rate, whichever is lower. It is also not in dispute that the objector paid to the petitioner at departmental rate for the excess quantity of this work. The case of the petitioner is that this condition was unilateral imposed by respondent no.2 vide letter dated 7.1.86 and it was never accepted by him, and therefore, he is to be paid at the contract rate and not at the departmental rate.

8. Admittedly clause 16 of the agreement provided that any additional work which the contractor may be directed to do shall be carried by him on the same conditions in all respect on which he agreed to do the main work. Admittedly this clause was not deleted from the agreement when it was signed by the parties.

9. The tender submitted by the petitioner has only an offer to the respondent. The offer given by the petitioner was accepted vide letter dated 7.1.86. Admittedly letter dated 7.1.86 was received by the petitioner and formed part of the contract executed between the parties. If any offer is accepted with a modification or a condition, that modification/condition shall form part of the contract and shall be binding upon the parties to the contract. It is not as if the petitioner didn't accept the condition no.3 stipulated in the letter of acceptance dated 7.1.86. It was very much open to the petitioner not to agree to the condition stipulated in the letter dated 7.1.86 by writing to the respondent that the condition was not acceptable to him. But the petitioner didn't do so and after receiving their letter dated 7.1.86 he entered into a contract and the letter dated 7.1.86 formed part of that contract. Therefore, to my mind conditions stipulated in the letter dated 7.1.86 are binding upon both the parties being part of the contract executed between them. It is true that the condition stipulated in the letter dated 7.1.86 is contrary to clause 16 of the tender document. But, when the offer of the petitioner was accepted vide letter dated 7.1.86 it

amounted to modification of clause 16 of the tender document and the petitioner is bound by it.”

15. I agree with learned counsel for the appellant that the learned Additional District Judge has acted with material irregularity in as much as the view taken is that respondent's letter dated 7.1.1986 was not refuted by the appellant.

16. As noted hereinabove, the appellant duly replied to the letter dated 7.1.1986 by his letter dated 8.1.1986. Brief contours of appellant's letter dated 8.1.1986 have been noted by me hereinabove. Not only that , learned ADJ has ignored the departmental noting at the rear of appellant's letter dated 8.1.1986.

17. I note that the learned Arbitrator has duly noted appellant's response to the letter dated 7.1.1986 and as also noted office note penned down at the rear of the said letter. It appears that the learned ADJ was misled into not considering the said letter for the reason learned Arbitrator, while referring to the letter has not mentioned the date.

18. The learned Arbitrator has noted the contents of the letter and the departmental noting in the following words :-

“The contractor in response to the aforesaid letter of the Executive Engineer accepted only the condition regarding security deposit and the stamp duty and no other condition. To this effect there is office note also at page 10 of the agreement. Even in this note also there is no mention of this condition.”

19. For the reasons noted hereinabove, the view taken by

the learned ADJ which has modified the award cannot be accepted.

20. The appeal is allowed.

21. The impugned order dated 9.2.2004 in so far it has modified the award pertaining to claim No.1 is set aside. Pertaining to claim No.1 award is made a rule of the Court. For clarification, rest of the award as made rule of the court by the learned Addl. District Judge stands.

22. On Claim No.1, appellant would be entitled to interest @ 9% p.a. from date of decree till date of realisation.

23. LCR be returned.

24. No costs.

November 23, 2007
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PRADEEP NANDRAJOG, J.